IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 318

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT LIMITED, IRVING E. HERMANN and IDA MAE HERMANN, individually and as co-partners, d/b/a NEVADA AERO TRADES COMPANY, AIR INTERNATIONAL, INC., GREAT LAKES AIRLINES AGENCY, INC., SKYCOACH AGENCY OF NEVADA, INC., SKYCOACH AIRLINES AGENCY OF NEW YORK, INC., SKYCOACH AIRLINES AGENCY OF CHICAGO, INC., SKYCOACH AGENCY OF LOS ANGELES, INC., SUPER SKYCOACH AIRLINES AGENCY, INC., SKYCOACH AIRLINES AGENCY OF DETROIT, INC., and SKYCOACH AGENCY OF SAN FRANCISCO, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioners pray that this Court grant rehearing of its order of October 23, 1961, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

In the petition for certiorari in the present case, Petitioners urged, among other things, that Rule 19(g) of the Civil Aeronautics Board unlawfully curtailed subpoena rights secured to Petitioners by Section 6(c) of the Administrative Procedure Act (5 U.S.C. § 1005 (c)). Rule 19(g) provides that subpoenas compelling the attendance of C.A.B. personnel will not be issued to private parties who are respondents in adjudicatory proceedings before the Board unless both the "need" and "relevancy" of the evidence sought is established by the movant. Petitioners argued that the requirement of "need" is inconsistent with Section 6(c) of the A.P.A. which contemplates that subpoenas shall be issued simply upon a showing of "general relevance and reasonable scope of the evidence sought."

In conformity with Rule 58(2) of the rules of this Court, this petition for rehearing is confined to substantial grounds available to Petitioners not previously presented. Petitioners respectfully submit that certiorari should issue for the following reasons:

First. C.A.B. Rule 19(g), which expressly exempts the Enforcement Bureau of the Board from its requirements, cannot be reconciled with the proviso in Section 12 of the Administrative Procedure Act that administrative agency regulations "relating to evidence or procedure shall apply equally to agencies and persons." In short, Rule 19(g) is discriminatory on its face and its application in this case deprived Petitioners of a fair hearing.

Second. There is a substantial question whether the Civil Aeronautics Board decided the present case upon

the basis of the record in conformity with the requirements of Sections 7(c) and 8(b) of the Administrative Procedure Act and due process of law.

1. Rule 19(g) Is Discriminatory in Violation of Section 12 of the A.P.A.

C.A.B. Rule 19[1] governs the issuance of compulsory process in adjudicatory proceedings before the Board. The rule provides that a subpoena *ad testificandum* will be issued to any party upon application to the hearing examiner (Subsection (a)). A request for a subpoena *duces tecum* must be supported by a "showing of general relevance and reasonable scope of the evidence sought." (Subsection (c)).

A separate and special rule governs the issuance of subpoenas addressed to Board members or employees. The applicant must establish both "the need . . . for such evidence and the relevancy to the proceedings." The Enforcement Bureau—the prosecuting arm of the Board—is, however, exempt from this requirement. Rule 19(g) explicitly provides that "No application will be required for the attendance of Board personnel or the production of records in their custody when requested by an Enforcement Attorney."

Rule 19(g) is patently discriminatory. If the Enforcement Branch desires to subpoena an employee of a respondent as a witness, it is not required to make any showing whatever; the subpoena is issued upon request. But if the respondent, a private party, seeks to call an employee of the Board, it must satisfy an exacting standard; it must prove both "need" and

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[1] The rule is set out in the Appendix to the Petition for Certiorari, p. 68a *et seq.*

"relevancy." In the present case, the Bureau caused subpoenas to be issued to fifteen of the officers, employees, and former employees of the Petitioners. The Enforcement Branch obtained these subpoenas simply upon application. By contrast, the Hearing Examiner refused to issue subpoenas to eight Board employees requested by Petitioners because they did not first establish need and relevancy to his satisfaction (see App. to Petition, p. 8a).

Petitioners submit that Rule 19(g) is inconsistent with Section 12 of the A.P.A. (5 U.S.C. § 1011) which provides that "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." No "law" can be cited to support the discriminatory procedure established by Rule 19(g). The legislative history of the A.P.A. evidences Congressional intent that an administrative agency should not enjoy special privileges and exemptions denied to private citizens when the agency is engaged as a prosecutor or plaintiff in a quasi-judicial proceeding. (See Sen. Doc. No. 248, 79th Cong., 2d Sess. pp,. 324, 371 (1946)).

In sum, Petitioners were foreclosed from obtaining testimony by Board employees which they felt essential to their defense,[2] and at the conclusion of the proceeding the Board inflicted an economic death sentence. Whether or not an administrative agency is required by the Fifth Amendment to provide private parties with compulsory process. we submit it is clear

[2] Petitioners were not interested in obtaining testimony of a confidential character. The record shows that Petitioners were interested primarily in eliciting testimony respecting certain activities of Petitioners themselves which had been directly observed by Board employees whom Petitioners wished to call (see Petition, p. 16).

that once subpoena rights are granted they cannot be accorded on a basis which discriminates so harshly in favor of the prosecution and against the respondent in the administrative proceeding.

Petitioners respectfully submit that the issues raised are of general importance in the conduct of administrative proceedings. The right of private-party respondents to summon agency employees and investigators as witnesses in administrative hearings is a recurrent and troublesome issue which should be clarified by this Court. The decision below not only countenances an exacting standard for securing such testimony, but if allowed to stand it will also encourage discriminatory treatment of private-party respondents.

2. The Decision Making Procedure Followed by the Board Should Be Reviewed By This Court

There is a substantial question whether the Civil Aeronautics Board rendered a decision in the present case based upon the record, and whether, having arrived at a result without reference to the record, the Board assigned subordinates the task of preparing findings and an opinion to rationalize its decision.

The Administrative Procedure Act contemplates that a decision in an adjudicatory proceeding shall be based upon the record. Section 7(c) (5 U.S.C. § 1006) provides that "No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party," and under Section 8(b) (5 U.S.C. § 1007) a decision must include a statement of "findings and conclusions * * * upon all the material issues of fact, law, or discretion presented on the record." The Federal Aviation Act vests the decision making authority in the Board itself (49 U.S.C. §§ 1321, 1324).

Petitioners attempted, without success, to engage in discovery proceedings for the purpose of demonstrating that the Board decided this case without considering the record. In any event, the decision making procedure followed by the Board at the time the present case was decided was disclosed by Louis J. Hector in a widely discussed memorandum which he addressed to the President on September 10, 1959. (Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 Yale L. J. 931 (1960).) Hector was a member of the Board when the case at bar was orally argued before the Board, and his memorandum to the President is dated about two weeks before the opinion in the present case was announced by the Board on September 28, 1959 (see App. to Petition, p. 28a).

In his memorandum, Hector pointed out that "In almost every case before the CAB, every significant conclusion of the [hearing] examiner on important issues is challenged by the losing parties, and the appeal procedure to the Board covers every aspect of the case—legal, factual, and policy. The Board, in effect, tries the case all over again, frequently overturning the examiner's conclusions, which are certainly not considered binding and, on major issues, are not even treated as persuasive." (*Op. cit. supra*, at p. 945.) The Board's decisions, Hector explained, are written "by a staff of expert opinion writers after the decision has been made." (*Id.* at p. 947). According to Hector, "*There have been times when the Board made decisions in executive session and then told the opinion writers what answer the opinion should come out with.* Major decisions of the Board have been made in that way. More often the opinion writer sits with the Board when a case is discussed. *There can*

be no real claim, however, that the Board tells the opinion writers in detail what to put in the opinion. The members do not know the detailed facts and statistics until the opinion writers dig them out of the record and present them in an opinion." (*Ibid.*) (Emphasis supplied). Hector stated that he knew of "no case where the opinion writers ever came back to the Board and said the facts in the record of a case simply would not support a substantial decision previously made by the Board." (*Id.* at 948).

Hector further stated: "If the opinions of the Board ~~express what~~ actually goes on in the minds of the deciding members, this is coincidental or the result of the intuition that a good staff can develop over the years." (*Id.* at 947).

The evils inherent in this mode of decision making have been perceptively described in the following words (Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 Minn. L. Rev. 607 (1959)):

> "The agency members meet, when the case stands submitted, and vote on the case. The opinion writing section then prepares an opinion—with a minimum of instruction, or none, from the agency as to what it is to contain—in support of the result dictated by the vote. Naturally the opinion is written with a view to making that result stand up in a reviewing court. The opinion writers comb the record and the briefs to marshal all the facts and argument they can find in support of the result they have been told to justify; the facts and argument to the contrary are examined only with a view to meeting possible attack on the result in a reviewing court.
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> "Thus, instead of the decision of a case being based upon the findings of fact and determinations

of policy disclosed in the agency opinion, the findings and determinations are based upon the decision.

"This inversion makes a complete mockery of the limited judicial review of agency actions as the courts have rationalized it. For judicial review is limited on the theory that an agency has first ascertained what it believes the facts to be, then has made determinations of policy, and from those facts and policy has arrived at the decision. If the appellate courts really faced up to the facts of life—that is that the agency first decides what result it wants and then facts and policy are found by its staff to fit the result—the present theory of judicial review would have to be scrapped. Reviewing courts, conceivably, might still arrive at a similar limitation on their review; but they certainly would have to rationalize it differently.

"The facts of life I have described are well known, certainly among practitioners and agency members and staffs, even though sometimes only grudgingly admitted." (*Id.* at 613)

* * *

"The administrative process as it really is means that practitioners and clients spend an inordinate amount of time and money building up huge records, with meticulous research and great ingenuity, which are finally examined, for the purpose of making 'findings' and 'determinations,' only with an eye to justifying a result already arrived at. What actually prompts the result—*i.e.*, the votes of the agency members—may be a newspaper story, or a vague impression based upon the oral argument (which is usually ridiculously brief as compared with the vast records in so many of these cases), or some general preconceptions, or (possibly) a reading of briefs, or extra-record pressure—especially from members of Congress—or

goodness knows what. One thing that all too often does *not* prompt the result is the record so laboriously and expensively compiled, or the facts demonstrated therein which the agencies are supposed to find with such highly respected 'expertise.'" (*Id.* at 614)

* * *

"As I have indicated, I fully recognize the need, indeed desirability, of staff advice and assistance to the agency in decision making. But that is very different from having the agency decide a case for various reasons, good or bad, and then having the opinion—*i.e.*, the findings and determinations according to which the decision is to be supported—written by a lawyer-opinion-writing section which is simply writing a brief to the appellate courts in support of the decision otherwise arrived at. That process means that decisions can be reached irresponsibly, with the deciders never having to think through their rationalization, never having to examine their conclusion in the light of any logical relationship to the record. They can get away with voting in accordance (for instance) with the whispered advice of a politician because they do not have to justify their vote; their skilled lawyer-opinion-writers will write a brief for them which will provide the necessary support for the purposes of a judicial review that is satisfied if 'some' evidence in the huge records can be made to point to the 'findings.' It is this irresponsibility, flowing from the separation of deciding and rationalizing, that opens the way to 'influence,' to incredible inconsistencies, and to downright superficial or even thoughtless decision of matters involving millions of dollars." (*Id.* at 615)

Petitioners do not contend that the Board cannot utilize assistants before reaching a decision (see *United States* v. *Morgan*, 313 U.S. 409), or that it is pre-

cluded from using assistants in preparing its opinions once a decision is reached. But clearly the requirement imposed by the A.P.A., that the Board must render a decision *"upon consideration of the . . . record"* is sapped of all vitality if the procedure described by Hector is sanctioned.

CONCLUSION

For the reasons discussed in the petition for certiorari and in this petition for rehearing, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: November 17, 1961

Certificate of Counsel

I, ABE KRASH, an attorney for Petitioners, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to the grounds specified in Rule 58 of the rules of this Court.

ABE KRASH

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